



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

BETWEEN:

**CHRISTOPHER VANDERSTOCK**  
First Plaintiff

**KATHLEEN DAVIES**  
Second Plaintiff

and

**THE STATE OF VICTORIA**  
Defendant

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**PROPOSED SUBMISSIONS OF THE AUSTRALIAN TRUCKING ASSOCIATION**

**PART I: Certification**

1. These submissions are suitable for publication on the internet.

**PART II: Basis of leave to be heard as amicus curiae**

- 20 2. The Australian Trucking Association (**ATA**) seeks leave to be heard as amicus curiae. The proposed submissions are in support of the plaintiffs. The ATA does not seek to be heard orally; it seeks only to make the written submissions below.

**PART III: Why leave should be granted**

3. The ATA seeks leave to be heard as amicus curiae on the basis that it “will make submissions which the Court should have to assist it to reach a correct determination”.<sup>1</sup> In particular, the ATA seeks leave to make submissions drawing attention to the practical implications for road users in Australia of this Court finding that s 7(1) of the *Zero and Low*

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<sup>1</sup> *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [6] (the Court).

*Emission Vehicle Distance-based Charge Act 2021 (Vic) (Charge Act)* is valid. In this regard, it seeks to take up the invitation of Brennan CJ,<sup>2</sup> recently repeated by Gordon J,<sup>3</sup> to make submissions on relevant fact. The ATA's submissions are made by reference to facts already contained in the Amended Special Case. The ATA also relies on an affidavit of Michael Deegan affirmed 4 October 2022 to supplement those facts. The submissions are intended to assist the Court in relation to matters not addressed by the plaintiffs.

- 10 4. In addition, the legal interests of the ATA's members will be affected by the outcome of the proceedings.<sup>4</sup> The ATA is the peak national association for the trucking industry (**Aff [5]**). The ATA's voting members comprise trucking businesses and State and sector trucking associations (**Aff [9]**). Through these associations, the ATA represents many other trucking businesses across Australia. The ATA's non-voting associate members include a number of major truck suppliers (**Aff [10]**).
- 20 5. At present, the tax imposed by the Charge Act applies to any electric, hydrogen or plug-in hybrid electric vehicle (**ZLEV**) with a gross vehicle mass of 4.5 tonnes or less.<sup>5</sup> The ATA has identified four electric cargo vans and light trucks with a gross vehicle mass of 4.5 tonnes or less that are currently available for sale in Australia: the EV Automotive EC11, the Renault Kangoo ZE, the Foton Mobility iBLUE and the SEA Electric SEA 300-45 EV (**Aff [22]**). In addition, Mercedes-Benz has announced that its eVito electric panel van will be available in Australia in the second half of 2022 (which will have a gross vehicle mass of 3.2 tonnes), and its next generation eSprinter will arrive in 2024 (the gross vehicle mass of which is presently unknown, but its diesel equivalent is 3.55 tonnes) (**Aff [23]**). If members of the ATA use any of these vehicles in the course of their business, and the

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<sup>2</sup> *Levy v Victoria* (1997) 189 CLR 579 at 604.

<sup>3</sup> "Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law" (Monash University Lucinda Lecture, 2 August 2022) 45.

<sup>4</sup> *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [6].

<sup>5</sup> Under the Charge Act, an "excluded vehicle" is defined to include a "heavy vehicle" (s 3). A "heavy vehicle" is defined to have the same meaning as in the Heavy Vehicle National Law (Victoria) (s 3). The National Law defines a "heavy vehicle" a vehicle which has a gross vehicle mass or an aggregate trailer mass of more than 4.5 tonnes (s 6(1)).

vehicle is registered in Victoria, they will be liable to pay the ZLEV charge if it is held constitutionally valid.

6. It is true that heavy vehicles are expressly excluded from the imposition of the ZLEV charge (ie vehicles with a gross vehicle mass of more than 4.5 tonnes). However, if the ZLEV charge is held not to be an excise, there would be no constitutional obstacle to Victoria’s extending the application of the ZLEV charge to heavy vehicles (or any other State and Territory imposing an equivalent to the ZLEV charge on heavy vehicles). An extension of the ZLEV charge to heavy vehicles would have a significant financial impact on the ATA’s members.

10 7. Further, that potential financial impact will grow in the future as truck manufacturers transition towards selling ZLEVs. The start of the transition to zero and low emission trucks can be seen in the Victorian Government’s *Victoria’s Zero Emissions Vehicle Roadmap*, which is included in the Amended Special Case. It states that “[m]ore fleet owners and operators in Victoria are showing interest in pilot deployments, and in transitions to ZEVs” (ASC055). For example, “Woolworths has been trialling electric vehicles, using a fully electric truck for store deliveries”, and “Linfox, a major freight and logistics company based in Victoria, is supporting Woolworths as it trials electric vehicle technologies” at a research centre. In addition, Deakin University and PACCAR Australia through its Kenworth brand are undertaking research and development of hydrogen fuel cell trucks for the freight industry, and a number of local councils have begun using electric trucks in their operations (ASC055). In this regard, it is noteworthy that, while both electric light vehicles and electric heavy vehicles are currently exempt from New Zealand’s road user charge system, those exemptions will expire on 31 March 2024 and 31 December 2025 respectively.<sup>6</sup>

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8. Further:

(a) major truck manufacturers, such as Volvo Group and Daimler Truck, have set targets for the sale of electric or zero emission vehicles by 2030 (Aff [24(a)]);

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<sup>6</sup> *Road User Charges (Exemption Period for Light Electric RUC Vehicles) Order 2012 (NZ)*; *Road User Charges (Exemption Period for Heavy Electric RUC Vehicles) Order 2017 (NZ)* (made under ss 37 and 37A of the *Road User Charges Act 2012 (NZ)*).

- (b) more generally: all major vehicle manufacturers in Europe have pledged to electrify most of their new vehicles between 2020 and 2035; in the United States, Ford and General Motors plan to sell zero emissions vehicles by 2035; and Norway, the United Kingdom, California and the European Union are phasing out the sale of new petrol and diesel vehicles between 2025 and 2035 (**Aff [32]**);<sup>7</sup>
- (c) the Australian Government has announced the development of a National Electric Vehicle Strategy, with a proposed objective of “encourag[ing] the rapid increase of demand for [electric vehicles]” (**Aff [32]**);<sup>8</sup>
- 10 (d) 16 national governments have signed a memorandum of understanding on zero emission medium and heavy duty vehicles, and have committed to identify pathways for zero emission trucks and buses to reach 30 per cent of sales by 2030 and 100 per cent by 2040 (**Aff [24(b)]**);<sup>9</sup> and
- (e) the California Air Resources Board recently proposed that, by 2040, all medium and heavy duty vehicles sold by manufacturers in California must be zero emissions vehicles (**Aff [24(c)]**).<sup>10</sup>
9. Indeed, the ATA is actively supporting the rollout of zero emission vehicles in the Australian truck and delivery vehicle fleet, having produced the first industry-led report on electric trucks in partnership with the Electric Vehicle Council (**Aff [17]**).<sup>11</sup>
- 20 10. To be clear, the ATA’s position is not that ZLEVs should be immune from the imposition of any charge calculated by reference to road use. Rather, the ATA submits that s 90 of the

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<sup>7</sup> Commonwealth of Australia, *National Electric Vehicle Strategy: Consultation Paper* (September 2022) 8.

<sup>8</sup> Commonwealth of Australia, *National Electric Vehicle Strategy: Consultation Paper* (September 2022) 4.

<sup>9</sup> The governments are Austria, Canada, Chile, Denmark, Finland, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Scotland, Switzerland, Turkey, United Kingdom, Uruguay and Wales: see <https://globaldrivetozero.org/mou-nations/>.

<sup>10</sup> California Air Resources Board, *Public Hearing to Consider the Proposed Advanced Clean Fleets Regulation: Staff Report – Initial Statement of Reasons* (30 August 2022) 6.

<sup>11</sup> Electric Vehicle Council and Australian Trucking Association, *Electric Trucks: Keeping Shelves Stocked in a Net Zero World* (18 January 2022).

Constitution provides that the imposition of any such charge is reserved exclusively to the Commonwealth Parliament.

11. Finally, any costs or delay from hearing from the ATA will not be disproportionate to the expected assistance.<sup>12</sup> The ATA adopts the submissions of the plaintiffs in relation to the proper construction of s 90 of the Constitution as well as the classification of the ZLEV charge as an excise. The ATA seeks only to supplement those submissions by reference to relevant fact. In addition, as noted above, the ATA does not seek to be heard orally.

#### **PART IV: Argument**

##### **The purpose of s 90**

- 10 12. The word “excise” has no clearly established meaning (**PS [18]**). In *Browns Transport Pty Ltd v Kropp*,<sup>13</sup> this Court unanimously said that the “essential distinguishing feature” of an excise “is that it is a tax imposed ‘upon’ or ‘in respect of’ or ‘in relation to’ goods”. The difficulty is identifying those taxes which are properly characterised as having the requisite connection with goods so as to constitute an “excise” within the meaning of s 90 of the Constitution. Although judicial pronouncements on the law should not be read as if they were a form of enacted law,<sup>14</sup> it is nonetheless helpful to recall that this Court recently observed that “[t]he degree of connection required between two subject matters joined by the words ‘relating to’ is ordinarily to be determined by reference to the text, context, legislative purpose and history of the provision, and, of course, the facts of the case”.<sup>15</sup>
- 20 Consistent with this observation, in ascertaining the meaning of “excise” the Court has

<sup>12</sup> *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4].

<sup>13</sup> (1958) 100 CLR 117 at 129, quoted in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 559 (Kitto J), 593 (Windeyer J); *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 21 (Kitto J); *Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 203 (McTiernan J); *Phillip Morris Ltd v Commissioner of Business Franchises (Victoria)* (1989) 167 CLR 399 at 430 (Mason CJ and Deane J).

<sup>14</sup> See, eg, *Comcare v PVYW* (2013) 250 CLR 246 at [15]-[16] (French CJ, Hayne, Crennan and Kiefel JJ).

<sup>15</sup> *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372 at [43] (the Court).

“sought to find elucidation in the relationship of the section with other provisions of the Constitution and with the purpose with which the section is thought to serve”.<sup>16</sup>

13. As the plaintiffs submit (**PS [11]**), it is now settled that the purpose of making the power to impose duties of excise exclusive was “to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action”.<sup>17</sup> It was to complement s 92 in avoiding “a fragmentation of the single Australian market through State-based non-tariff measures”.<sup>18</sup> In *Capital Duplicators Pty Ltd v Australian Capital Territory [No 1]*,<sup>19</sup> Brennan, Deane and Toohey JJ said:

10 It is a mistake to regard s 90 as doing no more than allocating the legislative powers to which it refers as between the Commonwealth and the States. It confined to the Parliament the power to impose duties of customs and excise and to grant bounties as a necessary part of the constitutional mechanism for achieving an essential objective of the federal compact: the creation and maintenance of a free trade area throughout the Commonwealth and uniformity in duties of customs and excise and in bounties.

14. The Constitution was intended to create a *commercial* federation at the same time as it created a political federation.<sup>20</sup> The creation of that commercial federation was the principal objective of Ch IV. As the plurality said in *Betfair Pty Ltd v Western Australia*,<sup>21</sup> “[t]he creation and fostering of national markets would further the plan of the Constitution for the creation of a new federal nation and would be expressive of national unity”. In this regard,
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<sup>16</sup> *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 584 (Mason CJ, Brennan, Deane and McHugh JJ).

<sup>17</sup> *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 260 (Dixon J).

<sup>18</sup> *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 423 (Mr Gageler SC).

<sup>19</sup> (1992) 177 CLR 248 at 277-278, quoted in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ).

<sup>20</sup> *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [23] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ), quoting Palgrave (ed), *Dictionary of Political Economy* (2<sup>nd</sup> ed, 1896) 45-46. See also *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 265 (McTiernan J) (observing that the object of s 90 is “a uniform fiscal policy for the Commonwealth”).

<sup>21</sup> (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

the Constitution must be “capable of fulfilling its high purpose of accompanying and aiding the national growth and progress of the people for whom it has been made”.<sup>22</sup>

15. For the reasons below, if the ZLEV charge were valid, this would frustrate the purpose of s 90. Through the fuel excise, the Commonwealth Parliament already imposes a tax which acts as a “proxy” for the cost of road use by vehicles powered by fuel. Of course, that tax is not payable (or not payable to the same extent) by the users of ZLEVs, and the Commonwealth Parliament has not yet imposed any equivalent charge with respect to ZLEVs. However, the ability of the Commonwealth Parliament to execute a policy for *all* road users to pay a charge reflecting their use of Australia’s road network would be hampered or defeated if the States and Territories could each charge different amounts for the use of a *subset* of the vehicles on Australia’s roads (being ZLEVs).

### Relationship between the ZLEV charge and the fuel excise

#### *The fuel excise*

16. The Commonwealth Parliament has imposed an excise on fuel.<sup>23</sup> Responsibility for paying the excise falls either on the “licensed manufacturer” of the goods or the owner of the goods where the owner enters the goods for home consumption.<sup>24</sup> The amount paid in excise is reflected in the retail price for fuel paid by purchasers (**Aff [26]**).<sup>25</sup> Businesses that use fuel off-road can claim fuel tax credits equal to the excise they paid. Businesses that operate eligible heavy vehicles can claim partial fuel tax credits equal to the fuel excise they paid minus a notional road user charge (**Aff [28]**).<sup>26</sup> Because fuel consumption is a product of (among other things) distance travelled and vehicle weight, the excise is a “proxy for the

<sup>22</sup> *Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 429 (Isaacs J).

<sup>23</sup> *Excise Tariff Act 1921* (Cth), Sch 1 item 10.

<sup>24</sup> *Excise Act 1901* (Cth), s 54.

<sup>25</sup> Webb, *Petrol and Diesel Excises* (Department of the Parliamentary Library, Research Paper No 6 2000-01, 3 October 2000) i, 1.

<sup>26</sup> Parliamentary Budget Office, *Fuel Taxation in Australia* (Budget Explainer, 21 September 2022), 2.

cost of road use, in that the total amount of excise a user pays through fuel consumption is related to distance travelled and vehicle weight” (Aff [26]-[28]).<sup>27</sup>

17. Of course, the price of fuel around Australia varies, as it is affected by a number of variables. However, the levying of the fuel excise allows the Parliament to have a significant influence on the price of fuel across the country. The Parliament exercised this influence by reducing the fuel excise for a six month period between March and September 2022.<sup>28</sup> In the Second Reading Speech for the relevant Bill, the then Assistant Treasurer said that the reduction in the fuel excise was intended “to reduce the pressure of high fuel prices on household budgets across Australia”.<sup>29</sup> The Assistant Treasurer also said that the Australian Competition and Consumer Commission will monitor the petroleum industry “to help ensure benefits are passed on to the intended recipients, the Australian people”.

18. The reduction of the fuel excise was an exercise of the “real control of the taxation of commodities” which s 90 was intended to confer on the Commonwealth Parliament. In *Hematite Petroleum Pty Ltd v Victoria*,<sup>30</sup> Mason J said:

What is more important is that Parliament, possessing exclusive power to impose both forms of duties, can protect and stimulate home production by fixing appropriate levels of customs and excise duties. And it can lower the level of domestic prices by lowering customs and excise duties ...

If the States had power to impose excise duties then the Commonwealth Parliament’s power to protect and stimulate home production and influence domestic price levels might be compromised.

<sup>27</sup> Webb, *Petrol and Diesel Excises* (Department of the Parliamentary Library, Research Paper No 6 2000-01, 3 October 2000) 5. However, the fuel excise “is a limited proxy”, in that “[w]hereas there is a roughly linear relationship between fuel use and vehicle mass, there is an exponential relationship between vehicle mass and road damage”: Fuel Taxation Inquiry Committee, *Report of the Inquiry into Fuel Taxation* (28 March 2002) 76 [2.6.2], see also 78 [2.6.3]. While the fuel taxation system has changed significantly since 2000 and 2002, those changes have not changed the essential character of the fuel excise as being a proxy for the cost of road use. The current fuel taxation system is summarised in Parliamentary Budget Office, *Fuel Taxation in Australia* (Budget Explainer, 21 September 2022) 1.

<sup>28</sup> *Excise Tariff Amendment (Cost of Living Support) Act 2022* (Cth).

<sup>29</sup> Commonwealth of Australia, House of Representatives, *Hansard* (30 March 2022) 1174.

<sup>30</sup> (1983) 151 CLR 599 at 631. See also *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 586-587 (Mason CJ, Brennan, Deane and McHugh JJ).

19. By lowering the fuel excise, Parliament reduced the domestic price level of fuel, especially for consumers and business operators of on-road light vehicles (**Aff [28]**).<sup>31</sup> Parliament’s power to influence the domestic price of fuel might have been compromised if the States and Territories also had power to influence the price of fuel in Australia.

*The ZLEV charge*

- 10 20. Broadly speaking, road-related fuel excise and the ZLEV charge are functionally equivalent. They both constitute a cost imposed on the use of vehicles, albeit that the ZLEV charge is calculated by reference to distance travelled more directly than the fuel excise. Of course, the fuel excise is not paid by users of ZLEVs (or is not payable to the same extent as users of fuel powered vehicles). In addition, to date, the Commonwealth Parliament has not imposed a charge on the use of ZLEVs equivalent to the fuel excise.
21. It is clear that the Victorian Government, in enacting the Charge Act, was conscious that the Commonwealth was not charging any tax on the use of ZLEVs on a distance basis. The Government’s *Victoria’s Zero Emissions Vehicle Roadmap* states that “[t]he introduction of a road user charge for low and zero emissions vehicles will more equitably fund roads and encourage optimisation of their usage in the absence of fuel excise raised on petroleum fuels” (**ASC065**; see also **ASC040**). In imposing the ZLEV charge, there was no prospect that users of ZLEVs would be effectively subject to double taxation by both the Commonwealth and Victoria for the same activity.
- 20 22. There has been consideration at the Commonwealth level of imposing a tax on ZLEVs equivalent to the fuel excise. In 2019, the Chair of the Senate Select Committee on Electric Vehicles, Senator Tim Storer, recommended that the Australian Government phase in a road user charge on electric vehicles over a five year period from 1 July 2025, levied at an equivalent rate to fuel excise, and calculated on a per kilometre travelled basis. The Senator recommended the long lead time for the phasing in of the charge on the basis that, “given

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<sup>31</sup> Parliamentary Budget Office, *Fuel Taxation in Australia* (Budget Explainer, 21 September 2022) 26. Business operators of on-road heavy vehicles received a much smaller reduction in their effective fuel excise – and in some cases faced significant cash flow and contractual issues – due to the interaction between fuel excise and the fuel tax credits system.

the price disparity between [electric vehicles] and [internal combustion engine] vehicles, [the charge may] serve as a disincentive to the purchase of [electric vehicles]” (Aff [35]).<sup>32</sup>

23. There has also been consideration of more wholesale reform at Commonwealth level to introduce distance-based pricing for *all* vehicles. On 2 December 2015, the then Minister for Territories, Local Government and Major Projects made a Ministerial Statement in which he said that the federal government wanted to “investigate the benefits, costs and potential next steps of options to introduce cost-reflective road pricing for all vehicles” (Aff [34]).<sup>33</sup> In this regard, the Minister identified that one of the “complex issues” that the government would need to work through was “getting a better understanding of the way that road users—in both heavy vehicles and other vehicles such as cars—would change their road user behaviour, if at all, in the face of a move to distance based pricing”.<sup>34</sup>

24. Very recently, on 28 September 2022, the Australian Government published its National Electric Vehicle Strategy Consultation Paper (Aff [32]). As noted above, one of the objectives of the proposed framework for the National Electric Vehicle Strategy is to “[e]ncourage rapid increase of demand for [electric vehicles]”.<sup>35</sup> One of the examples of potential actions to meet the Government’s objectives is “[a]lign treatment of [electric vehicles] in national and state government systems – road revenue, taxes ...”.<sup>36</sup> The Consultation Paper goes on to say:<sup>37</sup>

Planning is also required as future fuel excise revenue declines from reduced consumption of petrol and diesel. While this revenue is not currently earmarked for expenditure on roads, it is an important source of funding. In the long run, Australia will need a more sustainable and fair way to pay for roads.

We already have a system for setting nationally consistent charges to recover the cost of road use related to heavy vehicles. That system has been in place since 1996. It is subject to a cross-government reform proposal to improve the way that money is invested (‘Heavy Vehicle Road Reform’). Part of that reform is investigating

<sup>32</sup> Commonwealth of Australia, Senate Select Committee on Electric Vehicles, *Report* (January 2019) 139 [1.15].

<sup>33</sup> Commonwealth of Australia, House of Representatives, *Hansard* (2 December 2015) 14456.

<sup>34</sup> Commonwealth of Australia, House of Representatives, *Hansard* (2 December 2015) 14459.

<sup>35</sup> Commonwealth of Australia, *National Electric Vehicle Strategy: Consultation Paper* (September 2022) 4, 6.

<sup>36</sup> Commonwealth of Australia, *National Electric Vehicle Strategy: Consultation Paper* (September 2022) 4.

<sup>37</sup> Commonwealth of Australia, *National Electric Vehicle Strategy: Consultation Paper* (September 2022) 14.

more direct user charging options for heavy vehicles, including electric heavy vehicles.

The Consultation Paper then asks stakeholders to make submissions on the question: “Are there other proposals that could help drive demand for [electric vehicles] and provide a revenue source to help fund road infrastructure?”<sup>38</sup>

25. The ability of the Commonwealth Parliament to execute any policy whereby *all* road users are required to pay some form of distance-based tax would be hampered or defeated if the Charge Act is valid. In that event, the Parliament would be attempting to execute a policy that affects all road users in a context where a subset of those road users would already be subject to State taxes calculated by reference to distance travelled. For that reason, it would not have “real control of the taxation of commodities”, as it would not have the same control with respect to ZLEVs as it has with respect to fuel powered vehicles. That would be so notwithstanding that the ZLEV charge is functionally equivalent to the fuel excise, in that it is imposed on the same kind of good for the same kind of activity.

26. In this regard, it is important to observe that, at present, the setting of the fuel excise has the capacity to affect the use of almost all of the vehicles on Australia’s roads. That is because only a very small proportion of vehicles in Australia are electric. The Electric Vehicle Council recently estimated that only 0.12% of Australia’s light vehicle fleet is electric (**Aff [31]**).<sup>39</sup> However, that percentage will increase over time. In 2015, the CSIRO estimated that adoption of battery electric vehicles and plug-in hybrid electric vehicles will reach 30% of passenger vehicles by 2035 (**Aff [30]**).<sup>40</sup> An increase in the proportion of electric vehicles will obviously lead to a reduction in the revenue raised from the fuel excise. Indeed, the Commonwealth’s net road related fuel excise revenue is already eroding as a result of vehicles becoming more fuel efficient, despite the increasing number of

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<sup>38</sup> Commonwealth of Australia, *National Electric Vehicle Strategy: Consultation Paper* (September 2022) 14.

<sup>39</sup> Electric Vehicle Council, *State of Electric Vehicles* (August 2021) 6.

<sup>40</sup> CSIRO, “Future Energy Storage Trends: An Assessment of the Economic Viability, Potential Uptake and Impacts of Electrical Energy Storage on the NEM 2015-2035” (Report prepared for the Australian Energy Market Commission, September 2015) vi.

kilometres that Australian vehicles travel (**Aff [37]**).<sup>41</sup> Accordingly, if the Charge Act is valid, the “real control of the taxation of commodities” which the Commonwealth Parliament is intended to possess by reason of s 90 would be increasingly hampered as the uptake of electric vehicles increases.

27. The broad power to impose taxes under s 51(ii), and the presence of s 109, is not a basis to read s 90 narrowly or an answer to the points above. This point was addressed by Mason J in *Hematite Petroleum Pty Ltd v Victoria*:<sup>42</sup>

10 The Commonwealth’s control is stronger if it possesses exclusive power; then there is no potential for conflict between Commonwealth and State legislation. The possibility of the imposition of taxes on goods by the States in the period prior to the enactment of inconsistent legislation by the Commonwealth undermines the Commonwealth’s real control of the taxation of commodities and provides a further reason for rejecting the existence of s 109 as a basis for narrowing the ambit of the Commonwealth’s exclusive power under s 90. In any case, to make the power exclusive is to free its exercise from some of the political controversies and constraints which would inevitably surround any attempt by the Commonwealth Parliament to pass inconsistent legislation designed solely to override a State law.

- 20 28. The existence of potentially conflicting taxation regimes, or uncertainty about whether or not the Commonwealth will enact inconsistent legislation in the future, may also reduce demand for electric vehicles in Australia. Such a result would, somewhat ironically, be contrary to the stated intentions of both the Commonwealth and Victorian governments.

### **Contribution to road construction and maintenance costs**

29. Australia has a substantial road network. In 2018, Australia’s total road length was 877,651 kilometres (**Aff [37]**).<sup>43</sup> It is therefore unsurprising that expenditure by governments in

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<sup>41</sup> Australian Government, Bureau of Infrastructure and Transport Research Economics, *Australian Infrastructure and Transport Statistics – Yearbook 2021* (December 2021) 71, 120. ‘Net road related fuel excise’ is gross fuel excise revenue net of fuel tax credits and a small adjustment for the excise paid on off-road fuel use that is not claimed back as credits.

<sup>42</sup> (1983) 151 CLR 599 at 631-632.

<sup>43</sup> Australian Government, Bureau of Infrastructure and Transport Research Economics, *Australian Infrastructure and Transport Statistics – Yearbook 2021* (December 2021) 21.

Australia on roads is significant. In 2019-20, \$29.7 billion was spent on roads across Commonwealth, State and Territory, and local governments (**Aff [37]**).<sup>44</sup>

30. The fuel excise raises a significant amount of revenue for the Commonwealth, with net road-related fuel excise being \$11.7 billion in 2019-20 (**Aff [37]**).<sup>45</sup> It is true that revenue raised by the fuel excise is generally not hypothecated (or “earmarked”) for expenditure on roads (**Aff [28]**).<sup>46</sup> However, that revenue is nonetheless available to the Commonwealth to spend on roads across the country. In this regard, the Commonwealth spent \$5.3 billion on roads in 2019-20 (**Aff [37]**).<sup>47</sup>

10 31. A reduction in the amount of revenue raised by way of the fuel excise will mean that there is less money available to the Commonwealth from that source to spend on roads. In his Ministerial Statement made on 2 December 2015, the then Commonwealth Minister for Territories, Local Government and Major Projects said (**Aff [34]**):<sup>48</sup>

20 Roads are funded out of general government revenue, by all three levels of government, and the total amount spent each year nationally happens to be broadly in line with what governments receive each year through registration and other charges at the state level and fuel excise tax at the federal level. However, the required amount of road spending is likely to rise—and at the same time longer-term trends such as more fuel efficient vehicles and the rise of electric vehicles means that the fuel excise revenue stream may not be sufficient to meet the required amount of spending.

As discussed above, one of the options that was being explored by the Government at the time to deal with this potential shortfall was a movement towards “cost-reflective road pricing for all vehicles” (including electric vehicles).

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<sup>44</sup> Australian Government, Bureau of Infrastructure and Transport Research Economics, *Australian Infrastructure and Transport Statistics – Yearbook 2021* (December 2021) 21, 61.

<sup>45</sup> Australian Government, Bureau of Infrastructure and Transport Research Economics, *Australian Infrastructure and Transport Statistics – Yearbook 2021* (December 2021) 71.

<sup>46</sup> The formal link between fuel excise and road funding most recently ended in 1992. Partial hypothecation was re-introduced in 2014 with the re-introduction of fuel excise indexation: Parliamentary Budget Office, *Fuel Taxation in Australia* (Budget Explainer, 21 September 2022) 4-5.

<sup>47</sup> Australian Government, Bureau of Infrastructure and Transport Research Economics, *Australian Infrastructure and Transport Statistics – Yearbook 2021* (2021) 58.

<sup>48</sup> Commonwealth of Australia, House of Representatives, *Hansard* (2 December 2015) 14458.

32. A recent “Budget Explainer” document issued by the Parliamentary Budget Office expressly recognises the potential for the uptake of ZLEVs to undermine the revenue base for road construction and maintenance (**Aff [28]**):<sup>49</sup>

Using fuel tax to fund the cost of providing roads or aviation safety works as a way of collecting revenue for those purposes as long as the fuel use varies in proportion to the activity being funded. If that ceases to be the case, for instance with the development of electrically powered trucks or aircraft, the fuel tax would no longer be an efficient funding mechanism because fuel tax would no longer recover the cost of the regulation or public goods from all users concerned.

10 33. The Charge Act only applies to vehicles registered in Victoria, but applies to all their travel on “specified roads”. As the plaintiffs explain, the definition of “specified roads” is very broad and includes travel outside Victoria (**PS [56]**). The plaintiffs correctly point out that “the terms and practical operation of the Charge Act are such that the prospect that the ZLEV charge will be calculated other than by reference to the total distance travelled by the ZLEV will be remote” (**PS [54.2]**).

34. In practical terms, the Charge Act can operate to impose a charge on a vehicle for travel that occurs wholly outside Victoria (so long as the vehicle is registered in Victoria). For example, an electric vehicle registered in Queensland which travels from Brisbane to Sydney (ie a route wholly outside Victoria) is not liable to pay the ZLEV charge to Victoria, while an electric vehicle registered in Victoria which travels the exact same route is liable to pay \$23.63 by way of ZLEV charge (**Aff [38]**). In other words, the Charge Act operates to impose an inconsistent tax burden on businesses operating identical vehicles on the same route, even where those vehicles are travelling wholly outside Victoria.

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35. It is unthinkable that any revenue raised by Victoria through the imposition of the ZLEV charge will be spent on roads *outside* Victoria. Accordingly, Victoria has imposed a charge on the use of vehicles that, in the kind of circumstance just described, will *not* be used for one of the purposes for which such charges are ordinarily imposed, namely the capital cost and maintenance of the roads that are used by the vehicles subject to the tax. Indeed, the ATA has estimated that, if 100 per cent of the interstate kilometres travelled by Victorian

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<sup>49</sup> Parliamentary Budget Office, *Fuel Taxation in Australia* (Budget Explainer, 21 September 2022) 6.

registered light vehicles were driven by ZLEVs at the electric/hydrogen vehicle rate, Victoria would receive almost an additional \$59 million per year (**Aff [39]**). In this regard, the stated intention of the Victorian Government in its *Roadmap* to impose a road user charge on ZLEVS “to more equitably fund roads” has arguably not been achieved, at least from the perspective of the national road network (**ASC065**; see also **ASC040**).

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36. The Commonwealth Parliament’s exclusive power to levy distance-based taxes on the use of vehicles on Australian roads ensures that the revenue raised from those taxes is available to be spent on the entire national road network. In this regard, there is no doubt that Australia’s road network makes a substantial contribution to the Australian economy. For example, in 2019-2020, light commercial vehicles and trucks delivered 2.3 billion tonnes of freight.<sup>50</sup> The Commonwealth is the polity best placed to ensure that the revenue raised from the use of the Australian road network is deployed on the construction and maintenance of that network in a way that “aid[s] the national growth and progress of the people for whom [the Constitution] has been made”.<sup>51</sup>

### Increased regulatory burden

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37. It is already clear that Victoria will not be the only State to levy a tax on the use of ZLEVs. The New South Wales Parliament has enacted the *Electric Vehicles (Revenue Arrangements) Act 2021* (NSW), which imposes a charge which will be payable either on 1 July 2027 or when battery electric vehicles amount to 30 per cent of new vehicle sales in New South Wales (whichever comes first) (Sch 1 (definition of “relevant date”). The charge is payable for each kilometre for which a “relevant zero or low emission vehicle” travels on a “public place” (s 11(1)). The Act makes it clear that “public place” includes land in another State or Territory (s 11(3)(b)). The Act expressly states that it is “intended to have extraterritorial application as far as the legislative powers of the State permit,

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<sup>50</sup> Australian Bureau of Statistics, “Survey of Motor Vehicle Use, Australia” (21 December 2020) Table 25 <<https://www.abs.gov.au/statistics/industry/tourism-and-transport/survey-motor-vehicle-use-australia/latest-release>>.

<sup>51</sup> *Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 429 (Isaacs J).

including in relation to zero or low emissions vehicles registered in New South Wales that travel on roads in other States or Territories” (s 6).

38. In addition, the South Australian Parliament has passed the *Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA). That Act imposes an “electric vehicle registration levy” of “an amount calculated at the prescribed rate per kilometre travelled on roads and road related areas (whether within or outside the state)” (new s 37AA of the *Motor Vehicles Act 1959* (SA)) (s 8). The South Australian Act has the same trigger as the New South Wales Act as to when it will come into operation (s 2). The charge is only payable on distance travelled by an electric vehicle registered in South Australia. However, the Government in South Australia elected in March 2022 has introduced into the Parliament the *Motor Vehicles (Electric Vehicle Levy) Amendment Repeal Bill 2022*, which would repeal the *Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021*.

39. Finally, on 10 May 2022, the Western Australian Government announced that it would “introduce a distance-based road user charge for zero and low emission light vehicles commencing from July 1, 2027 to ensure all motorists pay their fair share towards the maintenance and construction of WA roads”.<sup>52</sup> The Government has not yet introduced a Bill into the Parliament. On 25 May 2022, Minister Saffioti told Estimates Committee A that “[i]deally, a nationally consistent rate would be applied, but that has not happened”, and that it was “a very good thing to be transparent and clear about the regime we are going to be operating under”, or “there will be a lot of people who are paying for the roads and a lot of people who will not be, and [she did] not think that is fair”.<sup>53</sup> In addition, in July 2022, Infrastructure Western Australia recommended that the Western Australian Government “[a]ddress the future loss of fuel excise revenue by working with other jurisdictions to design a fair and nationally compatible alternative to fuel excise for low and zero emissions vehicles”.<sup>54</sup>

<sup>52</sup> Government of Western Australia, “WA’s Climate Action Efforts Accelerate with \$60 Million EV Package” (Media Statement, 10 May 2022) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/05/WAs-climate-action-efforts-accelerate-with-60-million-dollar-EV-package.aspx>>.

<sup>53</sup> Western Australia Legislative Assembly, *Parliamentary Debates* (25 May 2022) E163.

<sup>54</sup> Infrastructure Western Australia, *Foundations for a Stronger Tomorrow: State Infrastructure Strategy* (July 2022) 233.

40. The members of the ATA have fleets which include vehicles registered in different States (Aff [21]). If State Acts like the Charge Act are valid, members will need to ensure that each of the vehicles which is registered in a relevant State complies with the legislative requirements for that State. Those legislative requirements are likely to differ between the States. For example, there are likely to be differences as to how the charges are paid, how evidence of distance travelled is submitted, and the availability of exemptions. In addition, it is likely that the rate at which the relevant charge is calculated will differ between States. Members with vehicles registered in multiple States will need to develop separate processes for ensuring that their vehicles comply with those requirements. Accordingly, the imposition of distance-based charges on the use of ZLEVs by individual States and Territories is likely to add considerably to the regulatory burden to which these members are already subject. This additional burden may reduce the incentive for these members to use ZLEVs. In this way, the enactment and implementation of the various State Acts are liable to hamper or defeat the execution of any Commonwealth policy which is directed to encouraging the use of ZLEVs in Australia.

**PART V: Estimate of time required for oral argument**

41. The ATA does not seek to present oral argument.

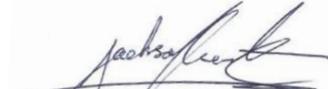
Dated: 4 October 2022

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

BETWEEN:

**CHRISTOPHER VANDERSTOCK**

First Plaintiff

**KATHLEEN DAVIES**

Second Plaintiff

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and

**THE STATE OF VICTORIA**

Defendant

**ANNEXURE TO THE PROPOSED SUBMISSIONS OF THE AUSTRALIAN TRUCKING  
ASSOCIATION**

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the ATA sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

No	Description	Version	Provision(s)
1.	Commonwealth Constitution	Current	Ch IV
2.	<i>Electric Vehicles (Revenue Arrangements) Act 2021 (NSW)</i>	Current	ss 6, 9, 11, Sch 1 (definition of “relevant date”)
3.	<i>Excise Act 1901 (Cth)</i>	Current	s 54
4.	<i>Excise Tariff Act 1921 (Cth)</i>	Current	Sch ,1 item 15
5.	<i>Excise Tariff Amendment (Cost of Living Support) Act 2022 (Cth)</i>	Current	All
6.	<i>Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021 (SA)</i>	Current	ss 2, 8
7.	<i>Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic)</i>	Current	All

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